Weinberg v. National Football League Players Association et al Doc. 30

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

Steve Weinberg, Plaintiff, vs. National Football League Players Association, Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Roger Kaplan, John Collins, Keith Washington, Tony Agnone, Howard Shatsky, and Mark Levin, Defendants.	§ § § § § § § § § § § § § §	Civil Action No. 3-06-CV2332-B **ECF**

**NFLPA DEFENDANTS' BRIEF IN RESPONSE
TO PLAINTIFF'S MOTION TO REMAND**

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PRELIMINARY STATEMENT

As set forth in the NFLPA Defendants' Motion to Compel Arbitration and to Dismiss, Plaintiff Steve Weinberg ("Weinberg") filed this lawsuit in a blatant attempt to circumvent the NFLPA Regulations Governing Contract Advisors (the "NFLPA Regulations"), which Weinberg agreed to abide by as a condition of becoming an NFLPA-certified Contract Advisor, and which subject all of his claims to mandatory, binding arbitration.[1] Now, by moving to remand this case to state court (the "Remand Motion"), Weinberg seeks to circumvent the federal Court's exclusive jurisdiction over his claims, which are essentially an attack upon the NFLPA Regulations.

This is not the first time that Weinberg has sought to thwart this Court's jurisdiction. Just last year, in another lawsuit filed by Weinberg relating to his decertification as an NFLPA Contract Advisor, Judge Kaplan – the Magistrate Judge presiding over this case – "ha[d] little difficulty" denying Weinberg's motion to remand because the lawsuit that Weinberg had filed in Texas state court was merely an attempt to "circumvent a prior federal order" of this very Court. Sports At Work Enters., Inc. v. Silber, No. 3-05-CV-2413-BD, Memorandum Opinion & Order at 6, 7 (Mar. 21, 2006) (Kaplan, J.).[2] Here, there are multiple, independent grounds for removing Weinberg's state law tort claims, and thus this Court should once again have "little difficulty" denying Weinberg's attempt to circumvent federal jurisdiction.

First, the key allegation underlying each one of Weinberg's state law tort claims is that he was allegedly wrongfully decertified as an NFLPA Contract Advisor. As Weinberg

[1] The NFLPA Defendants consist of Defendants National Football League Players Association ("NFLPA"), Richard Berthelsen, Gene Upshaw, Tom DePaso, Trace Armstrong, Mark Levin, John Collins, and Keith Washington.

[2] The NFLPA Regulations are attached as Exhibit 1 to the Declaration of Aaron D. Ford, which is filed concurrently herewith as Appendix A (App. at 1–3).

himself puts it: "[T]he crux of [his] claims is that the NFLPA Defendants and others conspired to ruin his life by fraudulently setting him up for decertification."[3] By filing his Petition in state court, Weinberg was thus asking the state court to inject itself into an internal disciplinary matter of the NFLPA, a certified union. Pursuant to Section 9(a) of the National Labor Relations Act ("NLRA"), however, the NFLPA has the exclusive authority to discipline its Contract Advisors, and claims challenging that authority fall within the exclusive province of federal law. See 29 U.S.C. § 159(a). Indeed, under the governing law of this Circuit, state law challenges to a union's exclusive bargaining powers are "completely preempted," and therefore removable. See Richardson v. United Steelworkers of Am., 864 F.2d 1162 (5th Cir. 1989). Because Weinberg cannot dispute the law, he disingenuously claims that his state law claims are not a challenge to his decertification by the NFLPA. (Remand Motion at 3.) But Weinberg cannot, by sleight of hand, disregard his own complaint allegations which make it clear that each of his state law claims is founded upon his allegedly wrongful decertification: "The purpose and goal of this conspiracy was to revoke Weinberg's certification as an NFLPA Contract Advisor." (Petition ¶ 38.)

Second, Weinberg's state law claims are also removable pursuant to Section 301 of the Labor-Management Relations Act ("LMRA"), see 29 U.S.C. § 185, which grants federal courts exclusive jurisdiction over state law tort claims that are intertwined with labor agreements. Specifically, Section 301 of the LMRA makes state law tort claims removable when they either require "substantial analysis" of a labor agreement, or are "founded directly on rights created by" a labor agreement. See Caterpillar Inc. v. Williams, 482 U.S. 386, 394 (1987). Here, Weinberg's state law tort claims require "substantial analysis" of the NFLPA Regulations and the NFL

[3] (Weinberg's Response to NFLPA Def.'s Mot. to Compel Arbitration at 6 (emphasis added).)

Collective Bargaining Agreement ("CBA") − both labor agreements − and Weinberg's state law tort claims are *also* "founded directly on rights created by" the NFLPA Regulations. The Petition is thus removable for three different and independent grounds under LMRA Section 301. Weinberg cannot (and does not) dispute the law on this point, so he again resorts to mischaracterizing the allegations of his state law tort claims.

For example, Weinberg argues that the repeated citations to the NFLPA Regulations and CBA in his Petition are merely "tangential," (Remand Motion at 2), but the very premise of his state law tort claims is that the suspension of his NFLPA certification "was excessive, unjust, wrongful, and violated the [NFLPA] Regulations." (Petition ¶ 54 (emphasis added).) Such claims cannot be adjudicated without "substantial analysis" of the specific provisions in the NFLPA Regulations and the CBA which the Defendants are supposed to have abused. Moreover, since neither Weinberg nor any other sports agent could serve as an NFLPA Contract Advisor if the NFLPA Regulations did not so provide, his state law claims are "founded directly" on a purported "right created by" that labor agreement. There is a long line of Section 301 cases holding NFLPA agents' and union members' state law tort claims to be completely preempted for precisely these reasons.[4] Weinberg, however, ignores every single one of these precedents. Weinberg even ignores the removal of yet another one of his own lawsuits because his state law claims required "substantial analysis" of the NFLPA Regulations. (See Defs.' Not. of Removal ¶ 14.) Weinberg's Remand Motion offers no explanation as to why this case should

[4] See, e.g., Smith v. Houston Oilers, Inc., 87 F.3d 717 (5th Cir. 1996) (Higginbotham, J); Holmes v. Nat'l Football League, 939 F. Supp. 517 (N.D. Tex. 1996); Black v. Nat'l Football League Players Ass'n, 87 F. Supp. 2d 1 (D.D.C. 2000).

be handled any differently than the authorities relied upon by the NFLPA Defendants to support federal jurisdiction.

This Court's diversity jurisdiction provides another statutory basis for removal, see 28 U.S.C. § 1332, since the two non-diverse Defendants (Washington and Collins) were improperly joined to defeat the Court's diversity jurisdiction. Because the Petition fails to state a claim against either Washington or Collins, removal is appropriate under the Fifth Circuit's improper joinder doctrine. Weinberg's response to the improper joinder claim set forth in the Defendants' Notice of Removal is to rest on his vague and conclusory allegations that Washington and Collins were part of a "conspiracy," but Fifth Circuit law is unequivocal that only specific allegations of a defendant's involvement in a conspiracy are sufficient to defeat an improper joinder claim. Here, there are no such specific allegations because Weinberg has frivolously alleged that Washington and Collins participated in the alleged conspiracy solely in an attempt to defeat diversity jurisdiction.[5] Indeed, Weinberg has conceded that his allegations of a conspiracy to commit fraud do not satisfy Rule 9(b). For all of the foregoing reasons, and as set forth below, Weinberg's Remand Motion should be denied.

ARGUMENT

Pursuant to 28 U.S.C. § 1441(a), a state court civil action is removable if the district court would have original jurisdiction over the case. See 28 U.S.C. § 1441(a). Removal is thus appropriate if the face of the state court complaint raises a federal question, see 28 U.S.C. §§ 1331, 1337, or if the substance of the complaint has been "completely preempted." See Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-8 (2003). "Complete preemption" permits

[5] (See Pl.'s Opp. to the NFLPA Defendants' Mot. to Compel Arbitration and to Dismiss the Petition at 12-13.)

removal of a case where the subject matter of a state law claim has been totally subsumed by federal law. See id. at 8 ("When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.").[6] Removal is thus appropriate here because the entire substance of Weinberg's state law tort claims is subsumed by federal labor law which falls within the exclusive jurisdiction of the federal courts. (See Points I, II, infra.) Moreover, as set forth in Point III, infra, removal is also appropriate pursuant to the Court's diversity jurisdiction because the non-diverse Defendants have been improperly joined.

I. WEINBERG'S STATE LAW CLAIMS ARE "COMPLETELY PREEMPTED," AND THUS REMOVABLE, UNDER SECTION 9(A) OF THE NLRA.

Pursuant to Section 9(a) of the NLRA, the NFLPA − as a certified union − has the exclusive authority to negotiate with NFL clubs on behalf of all NFL players, and thus "player agents are permitted to negotiate player contracts in the NFL only because the NFLPA has designated a portion of its exclusive representational authority to them." White v. Nat'l Football League, 92 F. Supp. 2d 918, 924 (D. Minn. 2000) (emphasis added); (See also Appendix in Support of NFLPA Defendants' Brief in Response to Plaintiff's Motion to Remand ("App.") at 12 (In re Dunn, CV 05-1000, slip op. at 2 (C.D. Cal. Mar. 1, 2006) (the NFLPA has "sole discretion in choosing its agents" under the NLRA)); cf. Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1475 (D. Colo. 1991), aff'd 976 F.2d 740 (10th Cir. 1992) (holding that, pursuant to

[6] Here, all of Weinberg's state law claims are removable, but the NFLPA Defendants note that as long as one state law claim is removable, the entire case is removable under the district court's supplemental jurisdiction. See Hernandez v. Jobe Concrete Prods., Inc., 282 F.3d 360, 362 n. 3 (5th Cir. 2002) ("once a claim is properly removed, the federal court can exercise supplemental jurisdiction over a non-related claim pursuant to 28 U.S.C. §1367(a)"); see also BIW Deceived v. Local S6, 132 F.3d 824, 833-34 (1st Cir. 1997) (same).

Section 9(a), the National Basketball Players Association has the exclusive authority to delegate its bargaining powers however it chooses).

Under the law of the Fifth Circuit, it is clear that state law claims challenging a union's exclusive bargaining powers under Section 9(a) are "completely preempted," and thus removable:

> The Union's right to act as plaintiffs' bargaining agent is conferred by the NLRA, and we hold that the duties corresponding to this right conferred by federal labor law are likewise defined solely by federal labor law. As a result of this complete preemption of state law, we further hold that the district court had removal jurisdiction over these actions.

Richardson , 864 F.2d at 1165; see also Condon v. Local 2944, United Steelworkers of Am., 683 F.2d 590, 594-95 (1st Cir. 1982) ("A union's rights and duties as the exclusive bargaining agent in carrying out its representational functions is precisely such an area; Congress has occupied the field and closed it to state regulation.") (internal citations and quotations omitted). Because Weinberg was decertified pursuant to the NFLPA's exclusive authority under Section 9(a) of the NLRA to delegate its bargaining powers as it chooses, Weinberg's state law tort claims constitute a direct challenge to "[t]he Union's right to act as [the] bargaining agent" for NFL players, and are thus "defined solely by federal law." Richardson, 864 F.2d at 1165.

In his Remand Motion, Weinberg does not even mention Richardson, which was prominently quoted in the Notice of Removal. (See Defs.' Notice of Removal ¶ 16.) Instead, Weinberg tries to circumvent the controlling Richardson case by arguing that his state law tort claims are something other than a challenge to his decertification by the union: "The NFLPA Defendants' (sic) have speciously attempted to couch Weinberg's claims as a challenge to the NFLPA's exclusive bargaining power under Section 9 of the NLRA, but Weinberg does not challenge his decertification." (Remand Motion at 3.) Weinberg's own statements, however, belie his disingenuous claim that he is "not challeng[ing] his decertification":

- "The crux of Weinberg's claims is that the NFLPA Defendants and others conspired to ruin his life by fraudulently setting him up for decertification …";[7]
- "The purpose and goal of this conspiracy was to revoke Weinberg's certification as an NFLPA Contract Advisor, thus preventing him from negotiating any more NFL player contracts and denying him the right to earn a living as an NFL agent";[8]
- "[T]he conspirators … sole focus and goal was to hurt and silence Weinberg by taking away his NFLPA license and all of his NFL clients";[9]
- "[The Defendants] used lies, deceit, and abuse of process to ultimately achieve their objectives: taking away Weinberg's NFLPA certification …";[10]
- "Weinberg's decertification served as the basis upon which the [Defendants] began disrupting Weinberg's income from previously negotiated player contracts."[11]

These admissions by Weinberg – most of which are from the Petition itself – leave no doubt that the essential foundation of Weinberg's state law tort claims is his allegedly wrongful decertification by the NFLPA. Indeed, the only injury that Weinberg alleges in the Petition is that he was denied "past, present, and future income" as a result of being wrongfully decertified as a Contract Advisor of the union. (Petition ¶ Introduction.)[12]

The decision in Collins is directly on point. There, an agent who had been decertified by the NBA players union (the "NBPA") asserted state law claims against the NBPA

[7] (Pl.'s Resp. to NFLPA Def.'s Mot. to Compel Arbitration at 6 (emphasis added).)

[8] (Petition ¶ 38 (emphasis added).)

[9] (Id. ¶ 54 (emphasis added).)

[10] (Id. ¶ Introduction (emphasis added).)

[11] (Pl.'s Resp. to Def. Roger Kaplan's Mot. to Dismiss for Lack of Personal Jurisdiction ¶ 12 (Feb. 1, 2007) (emphasis added).)

[12] Proving injury, is, of course, a required element of each of Weinberg's state law tort claims. (See Remand Motion at 14-15 (identifying injury as an element of each of Weinberg's state law tort claims).)

for tortious interference with his business relations (just as Weinberg alleges here). See Collins, 850 F. Supp. at 1473. The district court held that, pursuant to Section 9(a) of the NLRA, "[a] union may delegate some of its exclusive representational authority on terms that serve union purposes, as the NBPA has done here. The decision whether, to what extent and to whom to delegate that authority lies solely with the union." Id. at 1475 (emphasis added). Accordingly, the court held, the NBPA's decertification of Collins was "by definition privileged," and Collins's state law tort claims were "no more than another challenge of the NBPA's right to exercise its representational monopoly [under the NLRA]." Id. at 1481. The Court thus held that Collins's state law claims for tortious interference were preempted by Section 9(a) of the NLRA. Id. Here, Weinberg has also asserted state law challenges to his decertification as a union agent, and under Richardson, all of those claims are therefore "completely preempted" under Section 9(a) of the NLRA, and thus removable.[13]

II. WEINBERG'S STATE LAW CLAIMS ARE ALSO "COMPLETELY PREEMPTED" (AND REMOVABLE) UNDER SECTION 301 OF THE LMRA.

Pursuant to Section 301 of the LMRA, only federal courts may analyze the terms of labor agreements. See 29 U.S.C. § 185. As the Supreme Court has held, "[q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging

[13] Although removal was not an issue in Collins because Collins had properly filed his lawsuit in federal court, the decision is no less instructive since, under Richardson, preemption under Section 9(a) of the NLRA is "complete," thus granting removal jurisdiction to the district court. See Richardson, 864 F.2d at 1165.

liability in tort." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).[14] Thus, Section 301 "not only [preempts] state law but also authoriz[es] removal of actions that sought relief only under state law." Beneficial Nat'l Bank, 539 U.S. at 6-7; accord Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560-61 (1968) (preemption under Section 301 gives rise to removal).

There are two categories of state law tort claims which Section 301 "completely preempts," and thus makes removable. First, state law claims that require "substantial analysis" of a labor agreement are preempted. Caterpillar Inc., 482 U.S. at 394; Richter v. Merch. Fast Motor Line, Inc., 83 F.3d 96, 97 (5th Cir. 1996). Second, state law claims that are "founded directly on rights created by" a labor agreement. Caterpillar, 482 U.S. at 394; United Steelworkers of Am. v. Rawson, 495 U.S. 362, 371 (1990); Baker v. Farmers Elec. Coop., Inc., 34 F.3d 274, 280 (5th Cir. 1994). Here, Weinberg's state law tort claims require "substantial analysis" of the NFLPA Regulations and the CBA, and are also "founded directly on rights created by" the NFLPA Regulations. Thus, as set forth below, there are three additional grounds – under LMRA Section 301 alone – for removing Weinberg's Petition.

[14] See also Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962) ("The subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' … The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements.") (citations omitted).

A. Weinberg's State Law Tort Claims Require "Substantial Analysis" Of Both The NFLPA Regulations And The CBA.

Weinberg's own complaint allegations make it clear that his state law tort claims cannot be resolved without "substantial analysis" of the NFLPA Regulations and the CBA.[15] He expressly and repeatedly alleges that he was wrongfully decertified as a Contract Advisor in violation of the NFLPA Regulations. (See, e.g., Petition ¶ 54 ("The conspirators knew or should have known that their actions against Weinberg … were excessive, unjust, wrongful, and violated the Regulations.") (emphasis added); ¶ 61 (alleging that Weinberg was unable "to have the Regulations enforced as written").)[16] Another pervasive claim in Weinberg's Petition is that he was denied "due process" rights purportedly owed to him under the NFLPA Regulations. (See, e.g., id. ¶ 51 ("During this 'sham' proceeding, Weinberg was not afforded due process …").)[17] There is simply no way for a court to decide the merits of these factual allegations – which underlie all of Weinberg's state law tort claims – without "substantially analyzing" provisions in the NFLPA Regulations and the CBA. Indeed, if Weinberg cannot prove that his decertification was improper under these labor agreements, then he cannot prevail on any of his claims since the only injury that Weinberg alleges is that he was denied "past, present, and future income" as a result of his purportedly wrongful decertification. (Petition ¶ Introduction; (Pl.'s Resp. to Def. Kaplan's Mot. to Dismiss for Lack of Personal Jurisdiction ¶ 12 (Feb. 1, 2007)) ("Weinberg's decertification served as the basis upon which the [Defendants] began disrupting Weinberg's income from previously negotiated player contracts.") (emphasis added).)[18]

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[15] Courts have found that the NFLPA Regulations were formulated in accordance with the CBA, thus requiring preemption of state law claims which require "substantial analysis" of the NFLPA Regulations:

> It is undisputed that NFLPA is a labor union and that the NFLPA [Regulations] were formulated in accordance with the [CBA] …. Mr. Black and PMI are not parties to the [CBA], but, as contract advisors, they have agreed to be bound by the [NFLPA Regulations] promulgated under the [CBA]. Their license to act as agents for NFL players comes by delegation from the NFLPA, which is a party to the [CBA].

Black, 87 F. Supp. 2d at 4; cf., Holmes, 939 F. Supp. at 531 (holding state law tort claims preempted where they were "substantially dependent upon analysis of" the NFL Drug Program, a labor agreement ancillary to the CBA).

[16] (See also id. ¶¶ 38, 43, 48, 50-53, 55, 59, 63.)

[17] (See also id. § H ("The Conspirators Sprung Their Trap, Revoking Weinberg's Certification Immediately and Without Proper Due Process"); ¶ 55 ("[T]he conspirators deprived Weinberg of his right to due process.").)

For example, Weinberg claims in the Petition that his decertification by the union was a central component of the Defendants' conspiracy, and the cause of his claimed injuries.[19] The NFLPA Regulations and CBA both provide for such immediate decertification under "extraordinary circumstances,"[20] but Weinberg claims that there were no "extraordinary circumstances" to justify immediate decertification in his case. (See Petition ¶ 53.) Thus, in order to decide Weinberg's state law tort claims, a court would have to determine not only whether Weinberg violated the NFLPA Regulations, but also whether those violations rose to the level of "extraordinary circumstances" as that term is used in the NFLPA Regulations and the CBA. The Fifth Circuit's decision in Smith v. Houston Oilers, Inc., 87 F.3d 717 (5th Cir. 1996) (Higginbotham, J.) leaves no doubt that such an inquiry would constitute "substantial analysis" of the NFLPA Regulations and the CBA, and that Weinberg's claims are thus "completely preempted" – and removable – under Section 301 of the LMRA.

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[18] It goes without saying that establishing injury inflicted as a result of the alleged tort is a required element of each one of Weinberg's state law claims. (See Remand Motion at 14-15.) Moreover, Weinberg must prove that the Defendants committed "wrongful" or "unlawful" acts causing him injury to prevail on his Texas Business and Commercial Code claim. (See id. at 15.)

[19] (See Petition ¶ Introduction (Defendants "formed an evil cabal that conspired against [Weinberg] to immediately revoke his certification as an NFLPA Contract Advisor.") (emphasis in original); ¶ 54 ("[t]he [Defendants] knew that by timing the revocation as they did and making the revocation effective immediately, their actions would strike a brutal blow to Weinberg financially.") (emphasis added); ¶ 52 ("the decision to immediately revoke Weinberg's certification – a punishment reserved for 'extraordinary circumstances' – was [intended to] ... take away [Weinberg's] right to earn a living as an NFLPA Contract Advisor.") (emphasis in original).)

[20] (App. at 17 (CBA, Art. VI, § 1); Petition ¶¶ 53 (Weinberg acknowledging that Section 6B of the NFLPA Regulations permits immediate decertification under "extraordinary circumstances"), 55.)

In Smith, two NFL players asserted state law tort claims against the Houston Oilers after the Club required them to participate in an abusive rehabilitation program. See id. at 718-19. The district court held that because the CBA condoned mandatory rehabilitation programs, the rehabilitation program at issue "could be permitted by the CBA," and thus the related state law tort claims were "inextricably intertwined" with the CBA.[21] See id. at 720 (emphasis added). On appeal, the players argued that although the CBA permitted rehabilitation programs, the CBA did not permit the tortious conduct at issue, and thus their tort claims were not "inextricably intertwined" with the CBA. See id. at 719.[22] The Fifth Circuit rejected that argument, holding that an "inquiry into whether a CBA 'condoned' a defendant's conduct is only a means for addressing the ultimate question whether 'resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement.'" Id. at 720 (internal citations omitted) (affirming Section 301 preemption).

Weinberg's state law tort claims are "completely preempted" for the same exact reason. Just as the plaintiffs did in Smith, Weinberg acknowledges that the Defendants' conduct "could be" permitted by the NFLPA Regulations and the CBA. (See, e.g., Petition ¶ 53 ("Section 6B [of the NFLPA Regulations] did allow for immediate revocation … but was reserved for 'extraordinary circumstances'").) Moreover, to resolve his claims, a court must determine whether Weinberg's immediate decertification was "condoned" by the NFLPA Regulations and the CBA (e.g., whether Weinberg violated the NFLPA Regulations, and whether such violations constituted "extraordinary circumstances" justifying immediate decertification). But the Fifth

[21] The NFL Club first removed the players' lawsuit from Texas state court on Section 301 preemption grounds, and then successfully moved to dismiss the case on those same grounds (i.e., complete preemption under Section 301).

[22] Weinberg makes the identical claim when he repeatedly argues that he is merely asserting his common law right not to be the victim of a tort. (See, e.g., Remand Motion at 3, n.5, 16-17.)

Circuit held in Smith that "such inquiry into whether a CBA 'condone[s]' a defendant's conduct" is not permitted under state law, or by a state court. Smith, 87 F.3d at 720.[23]

This Court's decision in Holmes v. Nat'l Football League, 939 F. Supp. 517 (N.D. Tex. 1996), also supports removal. In Holmes, the Court held that an NFL player's state law tort claims, which included a fraud claim for being suspended without a "full due process hearing," were "completely preempted" by Section 301 because "[i]t simply cannot be determined whether the Lions [drug] test was the result of fraud … unless it is first resolved whether the Drug Program allowed the Lions to solicit and conduct the March 9, 1995 test." Id. at 522, 528, 527 ("[t]o resolve these claims the court must perforce analyze the CBA and the collectively-bargained Drug Program to ascertain whether the Lions defrauded Holmes….").[24] Here too, Weinberg's claim that he was fraudulently denied "due process" cannot be resolved without substantial analysis of the terms of the NFLPA Regulations and CBA.[25]

Black v. Nat'l Football League Players Ass'n, 87 F. Supp. 2d 1 (D.D.C. 2000) is yet another analogous case that Weinberg ignores. In Black, a former NFLPA Contract Advisor asserted essentially the same claims that Weinberg is alleging here: "Black claims that the [NFLPA] unlawfully initiated disciplinary proceedings against him, affecting his livelihood as a player agent." Id. at 2.[26] Moreover, just like Weinberg, "[t]he gravamen of Mr. Black's tortious interference claim [was] that NFLPA engaged in 'discriminatory treatment ... under the pretext of a disciplinary proceeding' and thereby deliberately interfered with his contractual relationships with NFL players." Id. at 4 (internal citations omitted). The District of Columbia district court held that Black's tortious interference claims were "inextricably intertwined" with the NFLPA Regulations and the CBA, and thus preempted under Section 301:

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[23] As set forth fully in the NFLPA Defendants' Motion to Compel Arbitration and to Dismiss the Petition, the neutral arbitrator held that Weinberg: (1) violated the Texas Business and Commerce Code by transferring money into offshore accounts and a sham corporation in an attempt to avoid a lawful judgment; (2) created a "conflict of interest" with the effective representation of his NFL player clients; (3) engaged in conduct which "reflect[ed] poorly on his fitness as a Contract Advisor"; and (4) prematurely collected fees from a client. (See NFLPA Defs.' Mot. to Compel Arbitration and to Dismiss the Pet. at 9-10 (Jan. 9, 2007).)

[24] Removal was not an issue in Holmes, but the case is nevertheless on point because the Court held that the state law tort claims were preempted by Section 301. See Avco, 390 U.S. at 560-61 (holding that Section 301 preemption necessarily gives rise to removal jurisdiction); Willy v. Coastal Corp., 855 F.2d 1160, 1165 (5th Cir. 1988).

[25] (See also App. at 20 (Diaz v. Gulf Coast Legal Found., No. H-88-0512, 1990 WL 282587, at * 4 (S.D. Tex. Nov. 8, 1990) ("If a plaintiff shows that a defendant made representations contrary to those in the contract, then interpretation of the CBA would be necessary.")).)

> Mr. Black's complaint is about the way in which NFLPA has conducted and will conduct his disciplinary proceeding. That complaint turns upon the proper application of the [NFLPA] [R]egulations to Mr. Black's alleged illegal activities as a contract advisor. Thus, … Mr. Black's state law claim 'cannot be described as independent of the [CBA]….'

Id. (internal citations omitted). Weinberg does not (and cannot) offer any explanation why the result should be any different here than in Black. (See also App. at 27 (Frost v. Harper, No. Civ. A. C-01-069, 2001 WL 34063533, at *5 (S.D. Tex. Mar. 23, 2001) (holding that claim for abuse of arbitration process was preempted "because such claims 'implicate both procedural and substantive aspects of the CBA grievance provisions, and thus also fall within Section 301 preemption under the LMRA.'") (internal citations omitted))).

Most incredibly, Weinberg even ignores the Weinberg v. Sowell case, in which his own state court complaint was removed because his claims "involve[d] the interpretation and application of the NFLPA Agent Regulations." (App. at 29-30 (Weinberg v. Sowell, No. Civ. A. 06-0611, Notice of Removal ¶ 1 (May 24, 2006)).)[27] In Sowell, Weinberg did not even move to

[26] Weinberg identically claims that "[t]he [Defendants] robbed [him] of his livelihood." (Petition ¶ Introduction.)

[27] In Weinberg v. Sowell, Weinberg sought to vacate an arbitration award under the NFLPA Regulations in which his attempt to collect fees from a former client was denied. The district court confirmed the arbitration award and dismissed Weinberg's lawsuit. (See App. at 51 (Order and Judgment (July 14, 2006)).)

remand the case, and the Virginia district court concluded that it had federal question jurisdiction over the matter in a subsequent Order granting the NFLPA's motion to intervene. (See id. at 53, 55 (Order at 2, 4 (June 22, 2006)).) Weinberg again disregards his own litigation history by turning a blind eye to the fact that this Court had "little difficulty" rejecting a remand motion filed by Weinberg just last year. Sports At Work Enters., Inc. v. Silber, No. 3-05-CV-2413-BD, Memorandum Opinion & Order at 7 (Mar. 21, 2006).[28]

B. Weinberg's State Law Tort Claims Are "Founded Directly On Rights Created By" The NFLPA Regulations.

Pursuant to Section 301 of the LMRA, state law tort claims which "are founded directly on rights created by" labor agreements are also preempted. Caterpillar, 482 U.S. at 394; Rawson, 495 U.S. at 371; Baker, 34 F.3d at 280. Here, Weinberg's state law tort claims are based on the allegation that he has been improperly denied his "right" to serve as an NFLPA Contract Advisor, and that he was denied his "due process rights" in connection with being decertified. These purported rights derive from the NFLPA Regulations, and Weinberg's state law tort claims are thus "completely preempted" under Section 301 on this additional ground.

First, with respect to Weinberg's claim that he was denied his "right" to serve as an NFLPA certified agent, this purported "right" exists only pursuant to the NFLPA Regulations. (See, e.g., Petition ¶ 38 ("The purpose and goal of [Defendants'] conspiracy was to revoke Weinberg's certification as an NFLPA Contract Advisor, thus preventing him from negotiating any more player contracts and denying him the right to earn a living as an NFL agent.") (emphasis

[28] In Sports at Work, Weinberg filed a state court action in an attempt to avoid the Weinberg v. Silber arbitration judgment, which both this Court and the Fifth Circuit had confirmed. See Sports at Work, No. 3-05-CV-2413-BD, Memorandum Opinion & Order at 1-5; Weinberg v. Silber, 57 Fed. Appx. 211, at *2-4 (5th Cir. 2003) (denying Weinberg's "specious," "meritless," "border[line] frivolous," and "feckless" appeal of the court's order confirming the arbitration award).

added).)[29] In fact, neither Weinberg nor any other person has any common law "right" to serve as an NFLPA certified agent. To the contrary, "[u]nder federal labor law, the NFLPA has exclusive authority to negotiate with NFL clubs on behalf of NFL players," and thus "[p]layer agents are permitted to negotiate player contracts in the NFL only because the NFLPA has designated a portion of its exclusive representational authority to them." White, 92 F. Supp. 2d at 924 (emphasis added); see also In re Dunn, CV 05-1000, slip op. at 2 (the NFLPA has "sole discretion in choosing its agents").

Contract Advisors such as Weinberg may receive a limited delegation of the NFLPA's bargaining powers only to the extent provided for in the NFLPA Regulations. As explained in the CBA:

> [P]ursuant to federal labor law, the NFLPA regulates the conduct of agents who represent players in individual contract negotiations with Clubs. The [NFL Management Council ("NFLMC")] and the Clubs agree that the Clubs are prohibited from engaging in individual contract negotiations with any agent who is not listed by the NFLPA as being duly certified by the NFLPA in accordance with its role as exclusive bargaining agent for NFL players.

CBA, Art. VI, § 1 (emphasis added).

The controlling NFLPA Regulations then provide that:

> No person … shall be permitted to conduct individual contract negotiations on behalf of a player and/or assist in or advise with respect to such negotiations with NFL Clubs … unless he/she is (1) currently certified as a Contract Advisor pursuant to these Regulations; (2) signs a Standard Representation Agreement with

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29 (See also Petition ¶ 52 ("the decision to immediately revoke Weinberg's certification ... was … specifically designed to … take away his right to earn a living as an NFLPA Contract Advisor") (emphasis altered); ¶ 91 (alleging that Weinberg "no longer has the right to earn a living at his chosen profession") (emphasis added); ¶ 139 ("Plaintiff has been denied the right to work because of his decertification by the NFLPA as a Certified Contract Advisor ….") (emphases added).)

> the player …; and (3) files a fully executed copy of the Standard Representation Agreement with the NFLPA.

(App. at 62 (NFLPA Regulations, § 1.A (emphasis added)).)[30] Because the key factual allegation underlying each one of Weinberg's state law tort claims is that he was improperly denied his purported "right" to serve as an NFLPA Contract Advisor, those claims are "founded directly on rights created by" the NFLPA Regulations, and are thus "completely preempted" and removable under Section 301 of the LMRA.

Weinberg's state law claims are removable pursuant to Section 301 for the additional reason that they hinge upon the alleged denial of so-called "due process rights" "founded directly on rights created by" the NFLPA Regulations. (See, e.g., Petition ¶¶ Introduction, 41, 42, 43, 48, 50-55, 59, 61, 63.) Weinberg's alleged right to "due process" under the NFLPA Regulations, however, is not a Constitutional or common law right, but a contractual "right" that arises, if at all, under the NFLPA Regulations themselves. See Dallas County Med. Soc'y v. Ubinas-Brache, M.D., 68 S.W.3d 31, 43 (Tex. App.—Dallas 2001, pet. denied) ("[Plaintiff's] allegations are merely that the decision made [by the private organizations] violated his due process rights. Thus, the common law does not provide a well-recognized remedy for [these] claims …") (emphasis added). Indeed, Weinberg identifies specific provisions of the NFLPA Regulations that the Defendants supposedly violated in the course of allegedly denying him due process.[31]

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[30] (See also NFLPA Regulations at Introduction ("These Regulations were adopted and amended pursuant to the authority and duty conferred upon the NFLPA as the exclusive collective bargaining representative of NFL players pursuant to Section 9(a) of the [NLRA] ….").)

[31] (See, e.g., Petition ¶ 42 (alleging that NFLPA violated its practice of waiting until Section 5 grievances were decided before pursuing a Section 6 grievance); ¶ 53 (arguing that "Section 6D of the Regulations … did not allow for immediate revocation of an agent's certification"); ¶ 63 (alleging that Defendants "took away Weinberg's right to a stay pending an appeal" under Section 6 of the NFLPA Regulations).)

For example, Weinberg alleges that by immediately decertifying him, the Defendants "took away [his] right to a stay pending an appeal," and that no "extraordinary circumstances" existed to justify such an immediate decertification. (Petition ¶¶ 53, 63 (emphasis added).) The only reason, however, that Weinberg has any "right" to an automatic stay absent "extraordinary circumstances" is because the NFLPA Regulations so provide. (NFLPA Regulations, § 6B (providing that the "automatic stay" of discipline does not apply where "extraordinary circumstances" have justified immediate decertification).) Weinberg's state law tort claims plainly derive from "rights created by" the NFLPA Regulations, and are thus "completely preempted" and removable pursuant to LMRA Section 301.

C. Weinberg Ignores All Of The Controlling Authority, And Instead Relies Upon Inapposite Cases From Other Jurisdictions.

Rather than acknowledging and/or responding to any of the controlling authorities cited above, Weinberg instead discusses a seemingly arbitrary assortment of inapposite cases. In fact, in Weinberg's thirteen-page section regarding NLRA and LMRA preemption (over half of his brief), he cites only one case decided by a court of this Circuit, Branson v. Greyhound Lines, Inc., 126 F.3d 747 (5th Cir. 1997), and Branson addresses virtually none of the issues presented here. (See Remand Motion at 4-17.) Branson involved a strike replacement worker who brought breach of contract and ERISA claims against his employer. See Branson, 126 F.3d at 749-50. The issues of preemption under Section 9(a) of the NLRA, and preemption under Section 301 of the LMRA where state law claims are "founded directly on rights created by" a labor agreement are not even discussed in Branson. The only legal issue in Branson that is relevant here is the discussion of Section 301 preemption where the state law claims require "substantial analysis." As a factual matter, however, Branson is completely distinguishable because the court found that there was not even a labor agreement in place at the time the plaintiff's claim arose. See id. at 755.[32]

Similarly, despite having a long line of analogous sports labor cases to choose from (*e.g.*, Smith, Holmes, Black, Collins, White), Weinberg does not discuss a single case involving the NFLPA or, for that matter, any sports union. Rather, Weinberg focuses on cases from outside the Fifth Circuit that either support the Defendants' position, or are simply irrelevant. For example, Sprewell v. Golden State Warriors, 266 F.3d 979 (9th Cir. 2001), trumpeted by Weinberg, strongly supports removal. Weinberg, however, fails to acknowledge the actual holding in that case: "to the extent Sprewell's interference claims are based upon alleged violations of the CBA, the district court properly dismissed those claims. That is, any allegation by Sprewell that the NBA's and the Warriors' [conduct was] 'wrongful' because [it] violated the CBA would necessarily require an interpretation of that agreement, and thus would be preempted by Section 301." Id. at 991(emphasis added).[33] Sprewell would thus compel Section 301 preemption here because all of Weinberg's claims are based upon his allegedly "wrongful" decertification under the NFLPA Regulations.[34]

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[32] "In fact, Branson was a replacement employee and had no interest in the CBAs. … Thus, because no collective bargaining agreement governed at the time Branson and Greyhound allegedly made their individual contract, we cannot find that Branson's individual claim seeks to limit or condition a collective bargaining agreement." Id. at 755.

[33] The Ninth Circuit reversed and remanded the district court's dismissal of Sprewell's tortious interference claims on Section 301 preemption grounds because the court was apparently uncertain of the district court's rationale for doing so. See Sprewell, 266 F.3d at 991. Specifically, the court held that if Sprewell's interference claims were predicated on general "wrongful" conduct, then such claims were not preempted, but if the claims were predicated on "wrongful" conduct under the NBA CBA, then such claims would be preempted. See id.

[34] The only other two sports labor cases cited by Weinberg are Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254 (E.D. Pa. 1977) aff'd 595 F. Supp. 1265 (3d Cir. 1979), which does not even discuss preemption under the NLRA or the LMRA, and Hendy v. Losse, 925 F.2d 1470 (9th Cir. 1991), in which a player sued his Club for hiring an unqualified team doctor in violation of its common law duty of care (as opposed to a violation of any provision in the CBA or the NFLPA Regulations). These cases are inapposite here.

Weinberg also spends much of his brief arguing that he is merely asserting a "common law" right not to be the victim of a tort, and that he did not give up his "civil law right" to sue the Defendants by virtue of being a party to the NFLPA Regulations.[35] (See Remand Motion at 17.) But under that theory, state law tort claims would never be preempted. That is simply not the law. Smith, 87 F.3d at 720-21 (preempting NFL player's state law intentional tort claims); Holmes, 939 F. Supp. at 528 (preempting NFL player's fraud claims); Black, 87 F. Supp. 2d at 4 (preempting NFLPA Contract Advisor's tortious interference claims).[36] Indeed, in Smith, the Fifth Circuit rejected outright a plaintiff's argument that his state law tort claims should not be preempted because he was merely asserting his right not to be the victim of a tort. Smith, 87 F.3d at 720-21. The bottom line is that while Weinberg may have a "right" not to be defrauded, Congress (and the courts) have permitted unions such as the NFLPA to remove these types of cases to federal court to ensure the development of a uniform national labor law and to protect them from state court intrusion into the federal labor law process.

III. THIS COURT HAS DIVERSITY JURISDICTION BECAUSE ALL NON-DIVERSE DEFENDANTS HAVE BEEN IMPROPERLY JOINED.

Removal is also appropriate where, as here, the non-diverse Defendants have been improperly joined to defeat diversity jurisdiction. Improper joinder is established by showing that there is "no reasonable basis for the district court to predict that the plaintiff might be able to

[35] In fact, Weinberg did give up his "civil law right" to bring the claims that he has asserted against the NFLPA Defendants because he agreed to arbitrate those claims. (See NFLPA Defs.' Mot. to Compel Arbitration.)

[36] The three pages of cases that Weinberg cites in "support" of his proposition that "intentional tort claims and breach of contract claims are frequently not preempted under § 301" are all from outside the Fifth Circuit, and all involve state law claims having no relationship to the state law claims asserted here. (See Remand Motion at Point B.1 (pp. 10-13) (citing non-Fifth Circuit cases involving negligent misrepresentation and breach of contract claims).)

recover" against all non-diverse defendants.[37] Smallwood v. Ill. Cent. R. Co., 385 F.3d 568, 573 (5th Cir. 2004). There are two methods for establishing that a plaintiff has no reasonable basis for recovery. First, the court may "conduct a Rule 12(b)(6)-type analysis, … to determine whether the complaint states a claim." Id. at 573. The second, alternative method for a court to determine that non-diverse defendants have been improperly joined is to "pierce the pleadings and conduct a summary inquiry" to "identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the improperly joined defendant." Id. at 573. As set forth below, Weinberg's claims against Washington and Collins fail both of these tests.

A. The Petition Fails To State A Claim Against The Non-Diverse Defendants.

Weinberg's answer to the Defendants' improper joinder claim is, for the most part, merely to state that Washington and Collins were part of the alleged conspiracy. (See Remand Motion at 20 (citing the various conspiracy counts in the Petition, which, in turn, merely list the elements of a conspiracy claim).) It is axiomatic, however, that a plaintiff must identify specific factual allegations to support its claims that non-diverse defendants participated in an alleged conspiracy.[38] See Badon v. RJR Nabisco, 224 F.3d 382, 392-93 (5th Cir. 2000) (finding improper joinder where plaintiff failed to allege "any particular or specific activity, agreement, or state of mind" on the part of the non-diverse, alleged co-conspirators); Flanders, 2005 WL 3068779, at *5

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[37] Weinberg points to language from Burden v. General Dynamics Corp., 60 F.3d 213, 216 (5th Cir. 1995), for the proposition that "[t]he relevant inquiry is whether the plaintiff 'has any possibility of recovery' against the party whose joinder is questioned." Remand Motion at 19 n.19. However, more recent cases hold that this is not the right test: "While Plaintiffs have accurately quoted the standard as stated in Burden, this Court believes [Griggs v. State Farm Lloyds, 181 F.3d 694, 701 (5th Cir. 1999)] to be the more accurate statement of the law regarding fraudulent joinder." (App. at 80 (Flanders v. Fortis Ins. Co, No. SA-05-CA-0726-RF, 2005 WL 3068779, at *3 (W.D. Tex. Nov. 14, 2005)).)

[38] Under Texas law, the elements of a civil conspiracy are "(1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful overt acts, and (5) damages as the proximate result." Watson v. Law Enforcement Alliance of Am., Inc., 386 F. Supp. 2d 874, 877 (W.D. Tex. 2005).

(finding a failure to state a conspiracy claim where the Petition "merely states the common law definition of conspiracy and is not accompanied by any factual assertions in support of their claim"); Watson, 386 F. Supp. 2d at 878 (finding improper joinder where the plaintiff "d[id] not sufficiently allege a knowing and intentional agreement … to commit an unlawful act.").[39]

With respect to Washington, the Petition is devoid of any allegation – much less a specific allegation – that he had any "meeting of the minds" with his alleged co-conspirators. To the contrary, Weinberg makes the startling admission that Washington participated in the alleged conspiracy "perhaps unknowingly."[40] Weinberg has thus failed to state a claim against Washington because he could not have "unknowingly" participated in the alleged conspiracy, see Watson, 386 F. Supp. 2d at 878, nor could he have "unknowingly" committed the remaining "intentional" torts. (See Remand Motion at 14-15.)[41]

Weinberg's conspiracy claims against Collins fail for the same reason – he does not specifically (or otherwise) allege that Collins had a "meeting of the minds" with any of his alleged co-conspirators to commit any unlawful acts.[42] The Petition likewise fails to state any individual claims against Collins. With respect to fraud, Weinberg alleges that Collins gave "false

[39] See also, e.g., Staples v. Merck & Co., 270 F. Supp. 2d 833, 846 (N.D. Tex. 2003) (holding that plaintiffs could not prevail on a conspiracy claim "because they have no evidence of a 'meeting of the minds' … Plaintiffs have made only a conclusory allegation that the Defendants acted in concert. Such allegations are insufficient under Texas law … Plaintiffs merely speculate that the [non-diverse defendant] agreed to defraud the Plaintiffs.").

[40] (See Pl.'s Response to Def. Roger Kaplan's Mot. to Dismiss for Lack of Personal Jurisdiction ¶ 13.)

[41] Moreover, Weinberg claims nothing more than that Washington submitted a letter which is not even alleged to be false. Even if the letter were purportedly false, submitting false evidence in connection with a hearing does not give rise to any claims under Texas law. See Morris v. Nowotny, 398 S.W.2d 661 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

[42] Weinberg merely alleges that he "believes that Collins, the attorney in Dallas, Texas who drafted the escrow agreement in the Texas garnishment action, was part of the conspiracy because he gave false testimony … against Weinberg in connection with Weinberg's appeal." Petition ¶ 82. Weinberg does not allege, however, that Collins had any "meeting of the minds" with his alleged co-conspirators. Moreover, it is well-settled that fraud and conspiracy claims may not be based on "belief" allegations. See e.g., Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 684 (7th Cir. 1992) (Posner, J.); Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972).

testimony" at Weinberg's disciplinary hearing, and that the Arbitrator "based his rulings on Collins's [allegedly] false testimony." (Petition ¶ 83.) To state a fraud claim, however, it is the plaintiff who must have relied upon the false statement, and thus Weinberg's fraud claim against Collins fails on its face. See Frost, 2001 WL 30463533, at *2.[43] Moreover, Weinberg has conceded that none of his claims of fraud meet the pleading requirements of Rule 9(b). (Weinberg's Response to NFLPA Def.'s Mot. to Compel Arbitration at 12-13.) A fortiori, Weinberg has not stated any actionable claim of fraud against Collins (or, for that matter, any of the non-diverse Defendants). With respect to the remaining tortious interference claims against Collins, Weinberg fails to allege how Collins's alleged conduct constituted interference, or even what contracts or prospective contracts Collins purportedly interfered with.

Weinberg has failed to state any claims against Washington or Collins for another reason: all of his state law claims are completely preempted by the NLRA and LMRA, as set forth above. Indeed, "complete preemption" functions not only to remove state law claims, but to dismiss them altogether. See, e.g., Smith 87 F.3d at 722 (Fifth Circuit affirming removal and dismissal of state law tort claims because of "complete preemption" under Section 301).

B. Even After A Summary Judgment-Type Inquiry, Weinberg Cannot Maintain A Cause Of Action Against The Non-Diverse Defendants.

The second, alternative method for a court to determine that non-diverse defendants have been improperly joined is to "pierce the pleadings and conduct a summary inquiry" to "identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the improperly joined defendant." Smallwood, 385 F.3d at 573. Because courts

[43] In any event, providing false testimony in a judicial proceeding is not actionable under Texas law. See Kale v. Palmer, 791 S.W.2d 628 (Tex. App.—Beaumont 1990, writ denied).

do not need not to "accept the petition's allegations in the face of countervailing evidence," and may thus consider declarations and "other summary judgment-type evidence," Defendants Washington and Collins have submitted declarations here.[44] (E.g. App. at 83-84 (Walker v. Philip Morris, Inc., No. Civ. A. 02-2995, 2003 WL 21914056, at *1-2 (E.D. La. Aug. 8, 2003)).) In their respective declarations, Washington and Collins categorically deny all of the claims asserted against them by Weinberg. Under established law, Weinberg must therefore come forward with probative evidence to contradict the declarations – not more conclusory allegations – in order to defeat Defendants' improper joinder claim.[45] Weinberg will not, within the boundaries set by Rule 11, be able to present evidence to refute the sworn statements in Washington's and Collins's declarations, and thus a finding of improper joinder would be justified for this additional reason if the court found it necessary to consider this ground.[46]

IV. WEINBERG'S CLAIM FOR ATTORNEYS' FEES IS ABSURD.

The litigious Weinberg is no stranger to alleging "facts" and taking "legal" positions that test the boundaries of Rule 11, and the request in his Remand Motion for attorneys' fees is no exception. The authority supporting the Defendants' removal of this case speaks for itself, and the NFLPA Defendants will say nothing further with respect to Weinberg's insupportable request for attorneys' fees other than that it should be denied.

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[44] (See Declaration of Keith Washington ("Washington Decl.") and Declaration of John Collins ("Collins Decl.") filed concurrently herewith as Appendices B and C (App. at 88-89; 90-92).)

[45] See, e.g., Hornbuckle v. State Farm Lloyds, 385 F.3d 538, 545 (5th Cir. 2004); Badon, 224 F.3d 382, 393-94 (5th Cir. 2000) (factual controversies are resolved in favor of the nonmovant "only when … both parties have submitted evidence of contradictory facts. [A court does] not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.") (emphasis in original); Walker, 2003 WL 21914056, at *5 (a plaintiff is "required" to present evidence in response to any declarations proffered by the Defendants that negate the allegations in the Petition).

[46] For the reasons described earlier in the brief, the court does not even have to reach this last alternative point. However, if the Court believes it is necessary to reach this point, the NFLPA Defendants respectfully request a single deposition of Weinberg and document requests limited to the basis of Weinberg's claims against the two non-diverse Defendants. See, e.g., Guillory v. PPG Indus., Inc., 434 F.3d 303, 311 (5th Cir. 2005) (upholding Magistrate Judge's decision to permit six depositions and a limited document production to determine that a defendant was improperly joined).

CONCLUSION

For all the foregoing reasons, Weinberg's Remand Motion should be DENIED.

Dated: March 6, 2007

Respectfully submitted,

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ATTORNEYS FOR THE NFLPA DEFENDANTS

CERTIFICATE OF SERVICE

On March 6, 2007, I electronically transmitted the foregoing document using the ECF system for filing and transmittal of a Notice of Electronic Filing to those parties registered for ECF in this case. I further certify that the foregoing document was served on all counsel of record by ECF.

s/ Aaron D. Ford
Aaron D. Ford